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First Named Inventor

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Art Unit

36

Examiner Name

Poinvil, Frantzy

Attorney Docket Number

1029-03

ENCLOSURES (Check all that apply)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Art Unit : 3628
Examiner : Poinvil, Frantzy
Serial No. : 09/578,085
Filed: : May 24, 2000
Inventor : Richard Palmeri
Title : SYSTEM FOR ELECTRONIC
: RE-ALLOCATION OF A
: TRANSACTION AMOUNT TO
: AN INVESTMENT
Docket: 1029-03
Dated: May 7, 2007

APPEAL BRIEF

MS ~~Appeals~~ **AFTER FINAL**
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

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01 FC:2402 250.00 OP

Sir:

Appellants hereby submit this Appeal Brief to the Board of Patent Appeals and Interferences in response to the final Office Action dated October 6, 2006. A Notice of Appeal was filed on March 6, 2007 and so this Appeal Brief is believed to be timely filed. A check in the amount of \$250.00 for filing this Appeal Brief is attached.

I. REAL PARTY IN INTEREST

The present application is owned by the inventor, Richard Palmeri.

II. RELATED APPEALS AND INTERFERENCES

Appellant is not aware of any related appeals and/or interferences that might affect the outcome of this proceeding.

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01 FC:2401 250.00 OP

III. STATUS OF THE CLAIMS

Claims 30-58 are pending in the instant application. Claims 30-58 stand rejected under 35 U.S.C. §103(a) as allegedly being obvious over U.S. Patent No. 5,621,640 to Burke ("Burke") in view of published International Application No. WO 94/04979 to Hartt et al ("Hartt").

IV. STATUS OF AMENDMENTS

There were no amendments submitted after the final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention is a system for automatically re-allocating a portion of a transaction amount to an investment system, and more particularly to a system for diverting a portion of a transaction amount to a user investment trust to grow the funds for the benefits of the user or a designated beneficiary after a set gestation period. Independent Claims 30, 37, 46, and 52 are at issue in this appeal.

Claims 30 and 37 set forth a method and system, respectively, for electronically reallocating a portion of a transaction amount in a transaction between a user and a vendor, which includes electronically distributing a portion reallocated from the transaction amount from a user account to a vendor account; and electronically distributing the portion reallocated from the transaction amount from the vendor account to a user trust account, wherein the portion allocated from the transaction amount in the user trust account is placed in a user investment vehicle for the user.

Claims 46 and 52 also set forth a method and system, respectively, for electronically reallocating a portion of a transaction amount in a transaction between a user and a vendor. This

method/system includes electronically receiving at least a portion reallocated from the transaction amount from the vendor to the user account proximate in time to said transaction using an electronic system and placing said portion reallocated from said transaction amount in a user investment vehicle for said user.

As discussed in the Background of the Specification, the typical family is undereducated and or simply not able to save money for their children's steadily increasing cost of education, or to save money for retirement. Lower and middle income families are saddled with the need to provide for their future themselves, but without any additional income to put aside after paying for current expenses.

The claimed invention, conceived of by Mr. Palmeri at least as early as 1996, is a workable and efficient system that allows individuals to automatically put money aside. This money would be invested and grown for their future or their children's future, without the need for them to generate additional funds or manage said funds. *Specification pages 1 and 2. See also, Declaration of Richard Palmeri and attachments thereto (outlining the great benefits of the "Kids Bank and Trust" in letters to interested parties).*

In the claimed invention, funds are reallocated from a transaction amount between a user and a vendor to an investment vehicle for the user. As discussed in the Specification, the vendor would agree to allocate a portion of its own sale price for the investment. By making the re-allocation of a portion of the transaction price come directly from the vendor's sale price, the transaction is invisible to the user, and does not require him/her to invest his/her own funds. The vendor in turn receives direct benefits from this arrangement through its tremendous marketing appeal, which provides a significant incentive for the user to shop with them. Also, the vendor may receive tax incentives as well. *Specification pages 8-10.*

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Appellant respectfully requests that the Board review and overturn the rejection in this case. The following issue is presented on appeal in this case: whether Claims 30-58 are obvious over Burke in view of Hartt.

VII. ARGUMENT

A. Legal Standard

In order to determine whether a patent claim is obvious in light of the prior art, "the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined." *KSR International v. Teleflex et al*, 550 U. S. ____ (2007), Slip Opinion No. 04-1350 at 2, citing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

Seeking to resolve the question of obviousness with uniformity and consistency, the Court of Appeals for the Federal Circuit has employed an approach referred to as the "teaching, suggestion, or motivation" test (TSM test), under which a patent claim is only proved obvious if "some motivation or suggestion to combine the prior art teachings" can be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art. *Id.*

In affirming that application of a flexible TSM test¹ is consistent with *Graham*, the Supreme Court specifically noted that:

¹ The Supreme Court further noted that the Federal Circuit has also conformed to the flexible TSM test. *Id.* at 18, citing *Alza Corp. v. Mylan Labs., Inc.*, 464 F. 3d 1286, 1291 (2006) ("There is flexibility in our obviousness jurisprudence because a motivation may be found implicitly in the prior art. We do not have a rigid test that requires an actual teaching to combine . . .").

"...it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known." *Id.* at 15.

Under the TSM test, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on Applicants' disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991); M.P.E.P. § 2142. The mere fact that the prior art can be combined or modified does not make the resultant combination obvious unless the prior art also somehow suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 U.S.P.O.2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01.

Supreme Court and Federal Circuit precedent makes it clear that, in an obviousness situation, the prior art must teach or suggest each and every element of the claimed invention, and that any motivation to combine or modify the prior art must be based upon a suggestion in the prior art.²

² Finally, if an independent claim is nonobvious under 35 U.S.C. §103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 U.S.P.O.2d 1596 (Fed. Cir. 1988); M.P.E.P. § 2143.03.

B. The combined references do not teach or suggest every claim feature.

As discussed in more detail below, the Examiner has rejected the solicited claims over Burke / Hartt, even though, 1) the Examiner admits that Burke does not teach or suggest key aspects of the invention, 2) these key aspects of the claimed invention are fundamentally contrary to the purpose of the Burke system, 3) the Examiner has misread Hartt to attribute the suggestion of key aspects of the claimed invention to that reference, and 4) the complete lack of support for the Examiner's contention that the modification of these references along the lines of the invention would simply have been agreed to by the involved parties without any motivation.

Independent Claims 30 and 46 expressly recites the step of "electronically distributing at least a portion **reallocated from said transaction amount**....wherein said portion allocated from said transaction amount in said user trust account is placed in a **user investment vehicle** for said user." Similarly, independent Claims 37 and 52 expressly recite "wherein at least a portion **reallocated from said transaction amount**" is placed "in **an user investment vehicle** for the user." In Claims 37 and 52, this occurs "proximate in time" to the transaction.

The Examiner attempts to bypass the complete lack of teaching of these aspects of the claimed invention in the cited references by stating that "the timing and reallocation of funds do not affect the structure and functionality of the computerized system of Burke and Hartt et al. As such the Examiner asserts that the timing of reallocating funds in the system of Burke and Hartt et al would have been obvious to one of ordinary skill in the art to do based on the decisions and arrangements as would have been agreed by all the involved parties or entities."

First, this assertion is factually incorrect. The structure and functionality of these system would have to be modified to achieve the claimed invention. Second, these modifications are fundamentally inconsistent with the teachings of the references. Third, as the Supreme Court

warns in *Teleflex*, it is important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances will be combinations of what, in some sense, is already known. The Examiner must demonstrate why it would be obvious to one of ordinary skill would make modifications contrary to the teachings of the prior art – and without hindsight benefit of the Applicant's disclosure.

The Examiner in his rejection acknowledges himself that Burke does not reallocate a portion of the transaction amount. The Examiner admits on pages 3 and 4 of the Final Office Action dated October 6, 2006 that "Burke states that an investment amount may take the form of extra charges or excess payment made on a transaction" and that expressly states that Burke does not disclose "electronically distributing the portion reallocated from the transaction amount from the vendor account to a trust account using at least one electronic system, wherein the portion allocated from the transaction amount in the user trust account is placed in a user investment vehicle for the user". (Emphasis added.)

In Burke, no portion of the transaction amount is ever re-allocated, as the user must affirmatively decide to designate an amount in excess of the transaction amount designated by the user. Further, Burke discloses an "automatic philanthropic contribution system." Funds are not transferred to a user trust account or investment, but to various third party charities.

The system disclosed in Burke is fundamentally contrary to the instant claimed invention.

As discussed previously, the claimed invention provides the advantage that it allows individuals to put money into their own investments without the need to outlay extra money. Instead, the vendor would agree to allocate a portion of the sale price for the investment. By making the re-allocation of a portion of the transaction price come directly from the vendor's sale

price, the transaction is invisible to the user, and does not require him/her to invest his/her own funds.

The solicited claims positively recite the elements of this that are not taught or suggested in Burke. Burke does not disclose a user trust account, nor does it disclose an investment vehicle. As the Examiner has admitted, Burke also expressly teaches away from reallocating a portion of the transaction amount, and instead requires the user to provide extra funds – a significant problem that the claimed invention eliminates in the context of investment savings.

While Burke does disclose an electronic funds transfer system generally, this is not what the Applicant is claiming. Clearly, the structure and functionality of the system in Burke would have to be fundamentally altered to achieve the claimed invention.

But to attempt to add the claimed structure and functionality to Burke in the hindsight of the instant application would run contrary to the entire purpose of Burke. We respectfully submit that even under a more flexible TSM test, a determination of obviousness cannot be predicated on modifying a reference in a manner that is fundamentally contrary to its very purpose.

We next turn to the Hartt reference, which the Examiner now cites in combination with Burke as a basis for modifying Burke contrary to its purpose. Hartt discloses a "purchase rebate system with investment plan" that "is an alternative to expensive advertising." Hartt, page 2, lines 5-6. In the Hartt rebate system, "rebates may initially be placed in an escrow account and subsequently distributed to an investment program, for further purchases or to the subscriber." Hartt, page 2, lines 13-15.

As noted in the background, the Hartt system is related to a previous transactional system that allowed subscriber-purchasers to receive goods or services from a vendor by ordering them from a purchasing system and paying the purchase price to an escrow agent or a purchase

processing center. The escrow agent or a purchase processing center paid the vendor the wholesale price for the goods or services and used the remainder of the funds in escrow to purchase an aggregate annuity policy from an insurance company. The insurance company computed and reported a rebate factor which guaranteed a specific rebate amount in the future. Hartt, page 1, lines 7-16.

Hartt, like Burke, also fails to disclose, teach, or suggest "electronically distributing at least a portion reallocated from said transaction amount from said user account to said vendor account using at least one electronic system; and electronically distributing said portion reallocated from said transaction amount from said vendor account to said user trust account using at least one electronic system..."

We first note that the Examiner had previously cited the Hartt reference in a prior rejection, but withdrew the rejection when the Applicant demonstrated that Hartt did not teach or suggest this aspect of the invention. The Examiner's own apparent uncertainty as to whether Hartt teaches or suggests this aspect of the claimed invention is itself evidence that this aspect of the invention is not obvious to one of ordinary skill from this reference (and thus not from the Burke / Hartt combination)..

As stated in the Applicant's response of June 14, 2004 to overcome Hartt the first time it was cited, "Hartt et al. do not teach or suggest electronically receiving at least a portion reallocated from the transaction amount from the vendor to the user account. In Hartt et al., the subscriber transaction information is transferred after the transaction, such as by using written records, magnetic files, or electronic data transfer. Thereafter, the processor calculates the rebate amount and has these funds transferred to the investment. (Page 3, lines 1-21.)"

On page 4 of the Final Office Action, the Examiner's incorrectly contends that Hartt discloses transferring funds from a vendor account to an escrow account. But Hartt does not disclose this. Further, the Examiner does not address the expressly recited aspect of the claims that the transfer is accomplished electronically from a reallocated portion of the transaction amount, and Hartt fails to disclose this as well. Lastly, on page 6 of the Final Office Action, the Examiner incorrectly contends that Hartt teaches making this electronic reallocation proximate in time to the transaction itself, which Hartt also clearly does not disclose.

Hartt discloses their system on pages 3 and 4. They state "According to a block diagram of the preferred embodiment shown in Figure 1, a system processor 1 receives subscriber transaction information 4, 5 from each participating vendor regarding each subscriber's purchases from that vendor. Alternatively, the transaction information may be received from the subscriber.... Subscriber transaction information may be transferred through media such as magnetic file, written records, or electronic data transfer. The processor calculates a subscriber rebate representing a predetermined portion of each subscriber's purchase payment and transfers the subscriber rebate to an investment or pay-out system. According to one embodiment, the rebate may pass through an intermediate stage. The intermediate stage may be a holding area to allow the rebate amount to accumulate to a predetermined level before further processing or handling. The intermediate stage may be an escrow file."

Hartt does not specify where the funds for the rebate actually come from, but given that the rebate is based *indirectly* upon **information** obtained about the transaction, and is NOT reallocated from a vendor account, it is clear that it does not come from a portion reallocated from the transaction amount transferred from a vendor's account to a trust account – as positively

recited in the solicited claims. And, it certainly does not occur proximate in time to the transaction.

The stark contrast between the systems of Burke / Hartt and that of the claimed invention as expressly recited in the claims can be seen from the discussion on page 9 of the instant Specification of one embodiment of the process for reallocating a portion of the transaction amount from the vendor to the trust:

"...Transaction Processing Unit 14 processes the transaction, electronically withdrawing the funds (as in the case of a debit card), or processing the transaction for credit (as in the case of a credit card) or recording the transfer (as in the case of participating electronic cash services. Transaction Processing Unit 14 communicates this information to User Account Manager 11 in a conventional manner.

Thereafter, Transaction Processing Unit 14 sends the entire \$20 sale price to Vendor Institution 9. Transaction Processing Unit 17 may credit Vendor Account 18 for the full \$20, and thereafter debit \$1 for deposit in trust User Account 20 by the means previously described. Or, Transaction Processing Unit 17 may only credit \$19 of the \$20 to Vendor Account 18, and forward the remaining \$1 to Trust Institution 10.

Alternatively, Transaction Processing Unit 14 sends \$19 of the \$20 through Money Transfer System 12 to Vendor Institution 9, and sends \$1 of the \$20 to Trust Institution 10 via Money Transfer System 22. Money Transfer System 22, may, of course, be the same as either Money Transfer System 12 or 15, as previously described. This \$1 deposit is credited to trust User Account 20. The remaining \$19 is credited to Vendor Account 18 by Transaction Processing Unit 17 in Vendor Institution 9."

Neither Burke nor Hartt teach or suggest any such structure and functionality for reallocating a portion of the transaction amount from a vendor's account to a trust account. Instead, all Hartt discloses is a processor that receives information about the transaction and uses this information to determine a rebate amount to transfer to an escrow account. And, Burke expressly teaches against using a portion of the transaction amount and expressly teaches against transferring it to a user investment.

Again, the structure and functionality of the references would have to be significantly modified to achieve the claimed invention. In Burke, the modification is directly contrary to its teachings. In Hartt, at a minimum there is no suggestion for such modifications. And, Hartt's provision of a calculated rebate based on user information and the use of an escrow account clearly lead away from the claimed invention.

Thus modification of Burke envisioned by the Examiner does not come from any teaching in the Hartt reference, but instead from the Examiner's hindsight assertion that the modification of Burke in this regard would be an obvious choice – even though this is contrary to Burke itself even though Hartt suggests nothing on this point.

Without the hindsight benefit of the Applicant's Specification, the Examiner has not pointed to any teaching in Burke / Hartt or in the general knowledge of one of ordinary skill that would lead one of ordinary skill to modify these references contrary to their teaching to reallocate funds from the transaction from the vendor account to a user investment in the manner claimed – the Examiner has not explained *why* the parties would simply have agreed to such contrary modifications.

Thus, the Burke's expressly contrary teachings and the failure of Hartt to speak at all on this key aspect of the invention demonstrate that the Examiner has not established a *prima facie* obviousness in his stated rejection. Accordingly, we respectfully request that the rejection under 35 U.S.C. 103 be withdrawn.

VIII. CLAIMS APPENDIX

The claims that are the subject of the present appeal, Claims 30-58, are set forth in the attached "Claims Appendix."

IX. EVIDENCE APPENDIX

There is no separate Evidence Appendix for this appeal.

X. RELATED PROCEEDINGS APPENDIX

There is no Related Proceedings Appendix for this appeal.

XI. CONCLUSION

In view of the foregoing, it is respectfully submitted that the Examiner erred in not allowing all claims pending in the present application, Claims 30-58, over the prior art of record. While the solicited claims are believed to be non-obvious even in light of *Teleflex* (decided after the filing of the Notice of Appeal in this case), in the event that the Board feels that *Teleflex* provides a modification of the longstanding TSM test, the Applicant respectfully requests that he be allowed to re-open prosecution to have an opportunity to present any further evidence if necessary to demonstrate the non-obviousness of the invention.

For the reasons set forth above, we respectfully submit that that disposition should be a prompt notice of allowance, which action is respectfully requested.

Respectfully submitted,



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Claims Appendix

30. A method of electronically reallocating a portion of a transaction amount in a transaction between a user and a vendor, comprising the steps of:

maintaining at least one user account;

maintaining at least one vendor account;

maintaining at least one user trust account;

initiating said transaction for said transaction amount;

electronically distributing at least a portion reallocated from said transaction amount from said user account to said vendor account using at least one electronic system; and

electronically distributing said portion reallocated from said transaction amount from said vendor account to said user trust account using at least one electronic system, wherein said portion allocated from said transaction amount in said user trust account is placed in a user investment vehicle for said user.

31. The method of Claim 30, further comprising the step of separately identifying one or more selected from the group consisting of said user, said at least one user account, said at least one vendor account, and said at least one user trust account.

32. The method of Claim 30, further comprising the steps of:

maintaining a second user account; and

electronically distributing at least a portion of said transaction amount to said second user account.

33. (Previously Amended) The method of Claim 30, wherein said at least one user account is one or more selected from the group consisting of a credit card account, a checking account, and a savings account.

34. (Previously Amended) The method of Claim 30, further comprising the step of providing an interactive information source between said user and said user trust account, whereby said user trust account provides information to said user regarding said portion of said transaction amount placed in said investment vehicle.

35. The method of Claim 34, wherein said interactive information source is a Web site.

36. The method of Claim 34, wherein said interactive information source is a kiosk system.

37. A system for electronically reallocating a portion of a transaction amount in a transaction between a user and a vendor, comprising:

at least one user institution, said user institution comprising at least one user account and a user account transaction processing unit;

at least one vendor institution, said vendor institution comprising at least one vendor account and a vendor account transaction processing unit;

at least one user trust institution, said user trust institution comprising at least one user trust account for said user and a user trust account transaction processing unit;

at least one money transfer system, said money transfer system being in communication with said vendor, said user account transaction processing unit, said vendor account transaction processing unit and said user trust institution transaction processing unit;

wherein at least a portion reallocated from said transaction amount is electronically distributed from said user account to said vendor account and from said vendor account to said user trust account, wherein said portion reallocated from said transaction amount in said user trust account is placed in a user investment vehicle for said user.

38. The system of Claim 37, wherein said at least one user institution further comprises a user account manager for managing said user account.

39. The system of Claim 37, wherein said vendor institution further comprises a vendor account manager for managing said vendor account.

40. The system of Claim 37, further comprising a user identification system for identifying one or more selected from the group consisting of said user, said at least one user account, said at least one vendor account, and said at least one trust account.

41. The system of Claim 37, further comprising a second user account; wherein at least a portion of said transaction amount is electronically distributed to said second user account.

42. The system of Claim 37, wherein said at least one user account is one or more selected from the group consisting of a credit card account, a checking account, and a savings account.

43. The system of Claim 37, further comprising the an interactive information source in communication with said user and said trust institution, whereby said trust institution provides information to said user regarding said portion of said transaction amount placed in said investment vehicle.

44. The system of Claim 43, wherein said interactive information source comprises a Web site.

45. The system of Claim 43, wherein said interactive information source comprises a kiosk system.

46. A method of electronically reallocating a portion of a transaction amount in a transaction between a user and a vendor, comprising the steps of:

maintaining at least one user account;

electronically receiving at least a portion reallocated from said transaction amount from said vendor to said user account proximate in time to said transaction using an electronic system; and

placing said portion reallocated from said transaction amount in a user investment vehicle for said user.

47. The method of Claim 46, further comprising the steps of:

maintaining a second user account; and

electronically distributing at least a portion of said transaction amount to said second user account.

48. The method of Claim 46, wherein said transaction amount originates from one or more selected from the group consisting of a credit card, a checking account, and a savings account.

49. The method of Claim 47, further comprising the step of providing an interactive information source between said user and said user account, whereby information is provided to said user regarding said portion of said transaction amount placed in said investment vehicle.

50. The method of Claim 49, wherein said interactive information source is a Web site.

51. The method of Claim 49, wherein said interactive information source is a kiosk system.

52. A system for electronically reallocating a portion of a transaction amount in a transaction between a user and a vendor, comprising:

at least one user institution, said user institution comprising at least one user account for said user and a user account transaction processing unit;

at least one money transfer system, said money transfer system being in communication with said vendor and said user institution transaction processing unit;

wherein at least a portion reallocated from said transaction amount is electronically received from said vendor proximate in time to said transaction and is placed in an user investment vehicle for the user.

53. The system of Claim 52, wherein said at least one user institution further comprises a user account manager for managing said user account.

54. The system of Claim 52, further comprising a second user account; wherein at least a portion of said transaction amount is electronically distributed to said second user account.

55. The system of Claim 52, wherein said transaction amount originates from one or more selected from the group consisting of a credit card account, a checking account, and a savings account.

56. The system of Claim 23, further comprising the an interactive information source in communication with said user and said user institution, whereby said user institution provides information to said user regarding said portion of said transaction amount placed in said investment vehicle.

57. The system of Claim 56, wherein said interactive information source comprises a Web site.

58. The system of Claim 56, wherein said interactive information source comprises a kiosk system.